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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. EDDIE NELSON DUNBAR, Defendant and Appellant.	C074978 (Super. Ct. No. 98F04814)

Defendant Eddie Nelson Dunbar appeals from the trial court's denial of his petition for resentencing under the Three Strikes Reform Act of 2012 (Prop. 36, as approved by voters, Gen. Elec. (Nov. 6, 2012); Pen. Code, § 1170.126)[1] (the Act) based on the court's finding that resentencing would pose an unreasonable risk of danger to public safety. He contends (1) denying his petition on public safety grounds violates equal protection; (2) equal protection requires the right to a jury trial and proof beyond a

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[1] Undesignated statutory references are to the Penal Code.

reasonable doubt on the dangerousness determination; (3) there is a presumption of resentencing under the statute and no substantial evidence supports the trial court's ruling denying his petition; (4) he is entitled to a jury trial and the proof beyond a reasonable doubt standard on the dangerousness determination; and (5) the proof beyond a reasonable doubt standard or the clear and convincing evidence standard applies to the dangerousness determination.

We conclude (1) the Act does not violate defendant's right to equal protection, (2) equal protection does not require a jury trial and proof beyond a reasonable doubt on the dangerousness determination, (3) there is no presumption for resentencing under the Act and the trial court did not abuse its discretion when it denied defendant's petition based on the dangerousness determination, (4) defendant is not entitled to a jury trial and the proof beyond a reasonable doubt standard because application of the Act may reduce a defendant's original sentence, and (5) the preponderance of evidence standard applies to the dangerousness determination. Accordingly, we shall affirm the judgment.

BACKGROUND

In May 1998, defendant was the subject of a traffic stop while on parole. Two baggies containing a total of 0.47 grams of methamphetamine were found in his possession. A jury convicted defendant of transportation of methamphetamine (Health & Saf. Code, § 11379) and possession of methamphetamine (Health & Saf. Code, § 11377) and sustained two prior prison term allegations (§ 667.5, subd. (b)). In March 2000, the trial court sustained two strike allegations and sentenced defendant to serve 27 years to life in prison.

Defendant filed a petition for habeas corpus seeking resentencing in November 2012. The trial court construed the habeas corpus petition as a section 1170.126 petition for resentencing, appointed counsel for defendant, and set the matter for hearing.

The prosecutor conceded defendant was eligible for resentencing. Prior to the hearing, defendant moved for resentencing based on his eligibility alone or for a jury trial on the issue of whether his resentencing posed an unreasonable risk of danger to public safety. The trial court denied the motion. The following evidence was presented at the hearing.

In May 1989, defendant was convicted of shooting at an inhabited dwelling (§ 246), two counts of assault with a firearm (§ 245, subd. (a)(2)), and four counts of felon in possession of a firearm (former § 12021, Stats. 2010, ch. 711, § 5) and sentenced to serve 14 years 4 months in state prison. These convictions were based on a series of events that included defendant shooting a man in the chest and firing a gun at an automobile with two passengers. Defendant also sustained felony convictions for possession of phencyclidine (PCP) (Health & Saf. Code, § 11377) in 1983 and three separate misdemeanor convictions related to drugs or vehicle theft between 1978 and 1980.

Defendant committed six violations of prison rules during his current incarceration: Possession of a lighter in 2001, misuse of state property in 2002, resisting a correctional officer and refusal to accept a compatible cellmate in 2005, mutual combat with a cellmate in 2006, and delaying a correctional officer in 2007.

Defendant was nearly 55 years old at the time of the hearing. His prison records from 2002 to 2012 stated his psychological status was clear for the general population, he had no gang affiliation, lacked a history of predatory or assaultive behavior, and was eligible for double cell housing. His placement scores showed a continuing downward adjustment over the last 12 years.

Defendant's fiancée, with whom he had a 27-year-old daughter, and defendant's brother informed the court they were willing and able to help his re-entry to society. Defendant's brother helped defendant get a commercial truck driving license in the

1990's and determined defendant could update his skills as a truck driver upon release. Defendant's fiancée was gainfully employed and defendant would have her full support and a stable place to live with her.

The trial court ruled as follows:

"It is the duty of this Court to determine if the People have met their burden of proof by a preponderance of the evidence; that i[s], if released, the petitioner would pose an unreasonable risk of danger to the public safety.

"The Court has considered motions and documents filed by the respective parties, family members, records of the Department of Corrections and Rehabilitation, all court records and arguments of counsel.

"The Court finds that [defendant] has made very minimal personal efforts towards his own rehabilitation. He has not attended self-improvement [classes] or completed courses designed to help him gain insight into the reasons for his past criminal behavior. He has not furthered his education or obtained any degrees. There is no evidence that he has addressed his controlled substance issues. There is no evidence he has addressed his issues in violence.

"[Defendant] committed offenses in prison during his previous commitments and during his commitment on his present incarceration. During his current prison commitment he engaged in mutual combat and resisted and delayed correctional officers. He has consistently failed to follow rules even while incarcerated. [Defendant] has a very serious and repetitive past criminal history.

"The Court recognizes that [defendant] has some work history in prison, and the Court notes that he does have support from family members who would like to help [defendant]; however, based on [defendant]'s extensive and repetitive history of violence, his substance abuse, his inability to follow rules even while incarcerated, as well as his minimalistic efforts towards insight and rehabilitation, the Court finds that the People

have met their burden of proof, that if the Petitioner were to be released he would pose an unreasonable risk of danger to public safety."

DISCUSSION

I

The Act Does Not Violate Defendant's Right to Equal Protection

Defendant contends denying his recall petition because defendant posed an unreasonable risk of danger to public safety violated his right to equal protection. We disagree.

Following the Act, a defendant convicted of a felony with two or more prior strike allegations is subject to a 25-year-to-life sentence if the current conviction is a serious or violent felony but is subject only to a two-strike sentence if the current felony is not serious or violent. (§§ 667, subds. (e)(2)(A), (e)(2)(C), 1170.12, subds. (c)(2)(A), (c)(2)(C); *People v. Yearwood* (2013) 213 Cal.App.4th 161, 170 (*Yearwood*).) "Sections 667, subdivision (e)(2)(C) and 1170.12, subdivision (c)(2)(C) contain four exceptions to the new restriction on imposition of a third strike sentence. Three exceptions relate to the nature of the current felony and one exception relates to the nature of the offender's prior felony convictions. If the prosecution pleads and proves one of the four exceptions, the offender will be sentenced as a third strike offender." (*Yearwood*, at p. 170.)

Section 1170.126 allows a person presently serving a three strikes sentence for a felony that is neither serious nor violent to petition for resentencing as a second strike offender. (§ 1170.126, subd. (a).) A prisoner is disqualified from resentencing if his or her current conviction or criminal record come within any of the four disqualifying factors listed in sections 667, subdivision (e)(2)(C) and 1170.12, subdivision (c)(2)(C). (§ 1170.126, subd. (e).) If the prisoner is not subject to one of the disqualifying factors, then the trial court shall resentence him or her under the two strikes provision "unless the

court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.126, subd. (f).)

Defendant contends he is similarly situated to defendants convicted after the effective date of the Act. According to defendant, "[t]he only practical difference between the two groups is the date of their sentencing and the date of sentencing is not a necessary distinction to further the purpose of the Act." He asserts there is neither a compelling state interest justifying the disparate treatment under the strict scrutiny standard nor a rational basis for the discrimination. He concludes equal protection compels granting his petition on the basis of "his eligibility status alone, without the need for any further hearing."

In order to understand why defendant is mistaken, it is necessary to understand what section 1170.126 does. Section 1170.126 does not change the lawful punishment meted out to defendants sentenced before the effective date of the Act. Defendants sentenced to serve three strike terms before the Act went into effect remain lawfully sentenced after the Act went into effect even if they would not be subject to a three strikes sentence if sentenced today. "The trial court takes 'the original sentence as given'; doing so leads to the inevitable determination that section 1170.126 provides a limited mechanism within which the trial court may consider a reduction of the sentence below the original term." (*People v. Bradford* (2014) 227 Cal.App.4th 1322, 1336.) Section 1170.126 provides for a limited retroactive application of the new sentencing scheme to some defendants sentenced before its effective date. (See *Yearwood, supra*, 213 Cal.App.4th at p. 175 [section 1170.126 operates as savings clause for the Act].)

"The right to equal protection of the law generally does not prevent the state from setting a starting point for a change in the law." (*People v. Lynch* (2012) 209 Cal.App.4th 353, 359 (*Lynch*).) Therefore, the equal protection guarantee "does not forbid statutes and statutory changes to have a beginning and thus to discriminate

between the rights of an earlier and later time." (*Sperry & Hutchinson Co. v. Rhodes* (1911) 220 U.S. 502, 505 [55 L.Ed. 561, 563].)

In *People v. Floyd* (2003) 31 Cal.4th 179, the California Supreme Court rejected a similar claim. In that case, the defendant claimed denying him the benefits of a statute creating an alternative sentencing scheme for drug offenders violated his equal protection rights by "creating two classes of nonviolent drug offenders" depending on the dates of conviction, and treating them in an unequal manner. (*Id.* at p. 188.) In rejecting this claim, the court stated: "Defendant has not cited a single case, in this state or any other, that recognizes an equal protection violation arising from the timing of the effective date of a statute lessening the punishment for a particular offense. Numerous courts, however, have rejected such a claim -- including this court. [Citation.]" (*Ibid*.)

The same analysis and conclusion applies to the Act: there is no equal protection violation arising from the timing of the effective date. In analyzing equal protection claims, "[w]e first ask whether the two classes are similarly situated with respect to the purpose of the law in question, but are treated differently. [Citation.] If groups are similarly situated but treated differently, the state must then provide a rational justification for the disparity. [Citation.] However, a law that interferes with a fundamental constitutional right or involves a suspect classification, such as race or national origin, is subject to strict scrutiny requiring a compelling state interest. [Citation.]" (*Lynch, supra*, 209 Cal.App.4th at p. 358.)

First, the two groups of defendants are not similarly situated because they were sentenced at different times under different laws. Second, the prospective application of a change in the law that may reduce a sentence for a crime does not implicate a fundamental right. (*Lynch, supra*, 209 Cal.App.4th at p. 360.) Even if the two groups of defendants are similarly situated, section 1170.126 does not involve suspect classification. Therefore, the statute is examined under the rational basis test.

Here, the rational basis test is satisfied. The Legislature may make statutes lessening the punishment for crime "prospective only, to assure that penal laws will maintain their desired deterrent effect by carrying out the original prescribed punishment as written. [Citation.]" (*In re Kapperman* (1974) 11 Cal.3d 542, 546.) By preventing resentencing when it poses an unreasonable threat to public safety, section 1170.126 helps preserve the deterrent effect of the laws changed by the Act.

Further, "[p]rospective application allows the Legislature to control the risk of new legislation by limiting its application. If the Legislature subsequently determines the benefits of the legislation outweigh the costs, then it may extend the benefits of the legislation retroactively. Requiring the Legislature to apply retroactively any change in the law benefitting criminal defendants imposes unnecessary additional burdens to the already difficult task of fashioning a criminal justice system that protects the public and rehabilitates criminals." (*Lynch, supra,* 209 Cal.App.4th at p. 361.)

In sum, the Act does not violate defendant's right to equal protection. Section 1170.126's limits on the retroactive application of the Act does not create two similarly situated classes of defendants, does not affect a fundamental right, is not based on a suspect classification, and advances a rational state interest.

II

Equal Protection Does Not Require a Jury Trial and Proof Beyond a Reasonable Doubt

Defendant contends he is entitled to a jury trial and the proof beyond a reasonable doubt standard on the dangerousness determination as a matter of equal protection. He claims he is similarly situated to "someone sentenced for a crime and then held in confinement beyond the normal term after a finding of dangerousness." (See §§ 2962, 2970 [mentally disordered offenders]; Welf. & Inst. Code, §§ 1800 [extended

commitment to Youth Authority based on mental abnormality], 6600 [sexually violent predator].)

Defendant's contention was rejected by another appellate court in *People v. Superior Court* (*Kaulick*) (2013) 215 Cal.App.4th 1279 (*Kaulick*).

As explained in *Kaulick*, defendant's "argument presumes that a finding of dangerousness is a factor which justifies enhancing a defendant's sentence beyond a statutorily presumed second strike sentence" and "that, once the trial court concluded that he was *eligible* for resentencing under the Act, he was subject *only* to a second strike sentence, unless the prosecution established dangerousness." (*Kaulick, supra*, 215 Cal.App.4th at pp. 1301-1302.)

"The statutory language, however, is not amenable to [the defendant]'s interpretation. [S]ection 1170.126, subdivision (f) does not state that a petitioner eligible for resentencing has his [or her] sentence immediately recalled and is resentenced to either a second strike term (if not dangerous) or a third strike indeterminate term (if dangerousness is established). Instead, the statute provides that he [or she] 'shall be resentenced' to a second strike sentence 'unless the court . . . determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.' In other words, dangerousness is not a factor which enhances the sentence imposed when a defendant is resentenced under the Act; instead, dangerousness is a hurdle which must be crossed in order for a defendant to be resentenced at all. If the court finds that resentencing a prisoner would pose an unreasonable risk of danger, the court does not resentence the prisoner, and the petitioner simply finishes out the term to which he or she was originally sentenced." (*Kaulick, supra*, 215 Cal.App.4th at pp. 1302-1303.)

"The maximum sentence to which [the defendant], and those similarly situated to him [or her], is subject was, and shall always be, the indeterminate life term to which he [or she] was originally sentenced. While Proposition 36 presents him [or her] with an

opportunity to be resentenced to a lesser term, unless certain facts are established, he [or she] is nonetheless still subject to the third strike sentence based on the facts established at the time he [or she] was originally sentenced. As such, a court's discretionary decision to decline to modify the sentence in his [or her] favor can be based on any otherwise appropriate factor (i.e., dangerousness), and such factor need not be established by proof beyond a reasonable doubt to a jury." (*Kaulick, supra*, 215 Cal.App.4th at p. 1303.)

We agree with *Kaulick*. Contrary to defendant's claim, he is not being confined beyond his original sentence. Thus, we reject defendant's contention that equal protection requires a jury trial and the proof beyond a reasonable doubt standard on the dangerousness determination.

III

Standard of Review for the Trial Court's Ruling Denying Defendant's Recall Petition

A.

There is No Presumption for Resentencing under the Act

Defendant claims section 1170.126 creates a presumption that he is entitled to resentencing absent proof resentencing poses an unreasonable risk of current danger to public safety.

Defendant's claim section 1170.126 creates a presumption in favor of a two strike sentence is based on *People v. Guinn* (1994) 28 Cal.App.4th 1130 (*Guinn*). *Guinn* interpreted section 190.5, subdivision (b), which states in pertinent part: "The penalty for a defendant found guilty of murder in the first degree, in any case in which one or more special circumstance[s] . . . has been found to be true under Section 190.4, who was 16 years of age or older and under the age of 18 years at the time of the commission of the crime, shall be confined in the state prison for life without possibility of parole or, at the discretion of the court, 25 years to life." (*Guinn*, at p. 1141, italics omitted.) The Court of Appeal in *Guinn* along with other Courts of Appeal held this language established the

"shall" option as "the presumptive punishment," and the court's discretion to choose the other disposition "is concomitantly circumscribed to that extent." (*Id*. at p. 1142; see *People v. Murray* (2012) 203 Cal.App.4th 277, 282; *People v. Ybarra* (2008) 166 Cal.App.4th 1069, 1089.) Defendant argues we should adopt the same construction for the similar language in section 1170.126, subdivision (f).

In a case decided after defendant's opening brief was filed, the California Supreme Court disapproved *Guinn*'s interpretation, *supra*,28 Cal.App.4th 1130, finding the text and history of section 190.5 was ambiguous. (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1372.) Employing the canon of construction that penal statutes should be construed as to avoid a "constitutionally problematic interpretation" (*id.* at p. 1374) the Supreme Court concluded a presumption in favor of life without possibility of parole would create serious Eighth Amendment problems, and therefore disapproved that interpretation. (*Id.* at p. 1387.)

The text of section 1170.126, subdivision (f), does not include language creating a presumption. Subdivision (f) states: "Upon receiving a petition for recall of sentence under this section, the court shall determine whether the petitioner satisfies the criteria in subdivision (e). If the petitioner satisfies the criteria in subdivision (e), the petitioner shall be resentenced pursuant to paragraph (1) of subdivision (c) of Section 667 and paragraph (1) of subdivision (e) of Section 1170.12 unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety."

As explained in *Kaulick*, dangerousness is a hurdle that must be crossed in order for a defendant to be resentenced. (*Kaulick*, *supra*, 215 Cal.App.4th at. p. 1303.) We do not read the text as creating a presumption for resentencing. Even if we consider the text ambiguous whether there is a presumption in favor of resentencing, we first turn to the Act's legislative history to resolve the ambiguity. "Where there is ambiguity in the

language of the measure, '[b]allot summaries and arguments may be considered when determining the voters' intent and understanding of a ballot measure.' [Citation.]" (*Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1037.) The Voter Information Guide states the Three Strikes Reform Act "[a]uthorizes resentencing for offenders currently serving life sentences if third strike conviction was not serious or violent and judge determines sentence does not pose unreasonable risk of danger to public safety." (Voter Information Guide, Gen. Elec. (Nov. 6, 2012) p. 48.) This description of the resentencing provisions of the Act is inconsistent with a presumption in favor of resentencing. As defendant does not cite and we cannot find any legislative history supporting his position, we conclude the trial court's discretion under section 1170.126, subdivision (f), is not circumscribed by a presumption in favor of resentencing.

B.

Abuse of Discretion Standard Applies to Trial Court's Ruling

We reject defendant's contentions that the trial court's ruling should be reviewed for substantial evidence or subject to de novo review. Contrary to defendant's contentions, the text and the purpose of section 1170.126 support the deferential abuse of discretion standard. Section 1170.126 addresses sentencing, whether the trial court will vacate a three strikes sentence and resentence defendant under the two strikes provisions. Sentencing matters in general and the application of the three strikes law in particular are matters within a trial court's discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 850-851; *People v. Carmony* (2004) 33 Cal.4th 367, 375 (*Carmony*).) Section 1170.126 makes it clear resentencing is a discretionary matter with the language allowing resentencing "unless the court, *in its discretion*, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.126, subd. (f), italics added.)

Although there is little practical difference between the substantial evidence and abuse of discretion standards (*People v. Gregerson* (2011) 202 Cal.App.4th 306, 319), we adopt the abuse of discretion standard because it is consistent with the statutory language and the sentencing function inherent in a section 1170.126 hearing. Defendant's claim we should apply de novo review is not supported by the authority he cites, a decision reviewing a trial court's decision regarding a request for records under the California Public Records Act (*CBS Broadcasting Inc. v. Superior Court* (2001) 91 Cal.App.4th 892, 905-906), and a case addressing statutory interpretation (*People v. Roberts* (2010) 184 Cal.App.4th 1149, 1179).

Under the abuse of discretion standard, it is not enough for a defendant to show reasonable people might disagree about the court's sentencing decision but rather, the defendant must show, for example, the court was unaware of its discretion or acted arbitrarily. (See *Carmony, supra,* 33 Cal.4th at pp. 376-378 [making these observations in terms of a trial court's exercise of discretion in determining whether to strike a defendant's strike].)

Here, the trial court stated it was familiar with the evidence presented and applied the appropriate standard of proof, the preponderance standard, on the People. (See *Kaulick, supra,* 215 Cal.App.4th at p. 1301.) It gave reasons for its decision that were supported by the record and relevant to the question before it, defendant had a violent history, a record of rules violations in prison that included violent behavior, and had done little to rehabilitate himself while in prison. Defendant's arguments to the contrary, that his crimes and rules violations are remote and his age and support system outside prison show his release poses little danger to public safety, amount to no more than a request to reweigh the factors considered by the trial court. This reweighing is not an appropriate basis on which to find an abuse of discretion. (*Carmony, supra,* 33 Cal.4th at p. 378.) The trial court's decision that resentencing posed an unreasonable risk of danger to public

safety was based on defendant's considerable criminal history and his record in prison. We conclude the trial court was aware of its discretion under section 1170.126 and there was no abuse of discretion.

IV

There is No Right to a Jury Trial and Proof Beyond a Reasonable Doubt on the Dangerousness Determination

Citing the Sixth Amendment and *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) [147 L.Ed.2d 435], defendant contends he is entitled to a jury trial and the proof beyond a reasonable doubt standard on the dangerousness determination. In support of his claim, defendant argues section 1170.126 "makes the two strike sentence the maximum authorized by the jury's verdict alone" and the dangerousness finding allows the trial court to increase his term to 25 years to life under the three strikes provisions.

In part II, *ante*, we followed *Kaulick* and rejected this interpretation of section 1170.126 that defendant was entitled to jury trial and proof beyond a reasonable doubt as a matter of equal protection under the law. The *Kaulick* decision also rejected the application of *Apprendi* asserted by defendant here. (*Kaulick, supra*, 215 Cal.App.4th at pp. 1302-1303.) Applying *Kaulick*, we reject defendant's *Apprendi* claim.

Defendant asserts *Kaulick* was decided before the Supreme Court's interpretation of *Apprendi, supra,* 530 U.S. 466 in *Alleyne v. United States* (2013) 570 U.S. __ [186 L.Ed.2d 314] and the application of *Alleyne* leads to a conclusion a jury trial is required. There, the United States Supreme Court held any fact that increases the mandatory minimum sentence for a crime must be submitted to the jury and proven beyond a reasonable doubt. (*Id*. at p. 2155.) It is defendant's reliance on *Alleyne* that is misplaced. A finding that resentencing would pose an unreasonable risk of danger to

public safety does not increase the mandatory minimum sentence for a third strike defendant's crime.

We also reject defendant's argument that the *Kaulick* court's reliance on *Dillon v. United States* (2010) 560 U.S. 817 (*Dillon*) was misplaced. In *Dillon*, the United States Supreme Court held federal sentence-modification proceedings that would adjust a prisoner's sentence downward if the applicable sentencing range in the federal Sentencing Guidelines was subsequently lowered did not implicate the Sixth Amendment right to have essential facts found by a jury beyond a reasonable doubt. Like the situation in *Dillon, supra,* 560 U.S. 817, the Act "provides for a proceeding where the original sentence may be modified downward." (*Kaulick, supra*, 215 Cal.App.4th at pp. 1303-1304.)

In sum, *Apprendi* does not apply to a statute that may reduce a defendant's original sentence. Therefore, the rule of *Apprendi* does not apply to the dangerousness determination under section 1170.126.

V

Standard of Proof for Dangerousness Determination

Defendant claims the beyond a reasonable doubt standard should apply to the dangerousness determination under section 1170.126. He claims, "the determination of the degree of proof has traditionally been left to the judiciary to resolve based on the rights and interests at stake." He argues that since an adverse ruling at the dangerousness hearing leads to a potential lifetime incarceration, his interests in the outcome "are every bit as great" as those involuntarily committed as narcotics addicts or those committed as gravely disabled or dangerous pursuant to the Lanterman-Petris-Short Act (LPS). Defendant concludes the proof beyond a reasonable doubt standard is necessary to protect his interests in the proceeding.

Evidence Code section 115 states in pertinent part: "Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence." This refers to statutory, constitutional, and decisional law. (Evid. Code, § 160.) Therefore, the preponderance standard is the default standard unless otherwise required by constitutional, statutory, or decisional law. (*Baxter Healthcare Corp. v. Denton* (2004) 120 Cal.App.4th 333, 368.)

The *Kaulick* court concluded the proper standard of review for determining danger to public safety under section 1170.126 is preponderance of the evidence. The court explained: "The maximum sentence to which [the defendant], and those similarly situated to him, is subject was, and shall always be, the indeterminate life term to which he was originally sentenced. While Proposition 36 presents him with an opportunity to be resentenced to a lesser term, unless certain facts are established, he is nonetheless still subject to the third strike sentence based on the facts established at the time he was originally sentenced. As such, a court's discretionary decision to decline to modify the sentence in his favor can be based on any otherwise appropriate factor (i.e., dangerousness), and such factor need not be established by proof beyond a reasonable doubt to a jury." (*Kaulick, supra,* 215 Cal.App.4th at p. 1303.) Accordingly, like the situation in *Dillon, supra,* 560 U.S. 817, where the Supreme Court held sentence-reduction proceedings authorized by title 18 of the United States Code, section 3582(c)(2), "do not implicate the Sixth Amendment right to have essential facts found by a jury beyond a reasonable doubt" (*Dillon* at pp. 828-829), section 1170.126 "provides for a proceeding where the original sentence may be modified downward. Any facts found at such a proceeding, . . . do not implicate Sixth Amendment issues." (*Kaulick, supra,* 215 Cal.App.4th at pp. 1304-1305.)

The *Kaulick* court then concluded, "the proper standard of proof is preponderance of the evidence," explaining: "Evidence Code section 115 provides that, '[e]xcept as

otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence.' There is no statute or case authority providing for a greater burden, and [the defendant] has not persuaded us that any greater burden is necessary. In contrast, it is the general rule in California that once a defendant is eligible for an increased penalty, the trial court, in exercising its discretion to impose that penalty, may rely on factors established by a preponderance of the evidence. [Citation.] As dangerousness is such a factor, preponderance of the evidence is the appropriate standard." (*Kaulick*, *supra*, 215 Cal.App.4th at p. 1305.)

We also reject defendant's additional argument that even if not compelled by the federal constitution, the proof beyond a reasonable doubt standard should be applied. He argues the hearing on dangerousness places "his freedom for the rest of his life potentially at stake," and therefore, "his interests in the outcome are every bit as great" as those of an individual facing involuntary commitment as a narcotics addict (see *People v. Thomas* (1977) 19 Cal.3d 630, 637) or as "gravely disabled" under the LPS (see *Conservatorship of Roulet* (1979) 23 Cal.3d 219, 225-226).[2] "In each of those

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[2] Defendant also cites *Conservatorship of Hofferber* (1980) 28 Cal.3d 161 for the proposition that an individual may be committed under LPS for being "dangerous," which must be proved beyond a reasonable doubt. However, in that case, our Supreme Court held "that every judgment creating or renewing a conservatorship *for an incompetent criminal defendant* under [Welfare and Institutions Code] section 5008, [former] subdivision (h)(2) must reflect written findings that, by reason of a mental disease, defect, or disorder, the person represents a substantial danger of physical harm to others." (*Id*. at pp. 176-177, italics added.) This subdivision, now subdivision (h)(1)(B), defines "gravely disabled" to include a defendant who is found to be mentally incompetent under section 1370 and other facts are also found to exist. (See Welf. & Inst. Code, § 5008, subd. (h)(1)(B).) In *Hofferber*, our Supreme Court read a dangerousness requirement into this definition of "gravely disabled" in order to comport with *Jackson v. Indiana* (1972) 406 U.S. 715, and *In re Davis* (1973) 8 Cal.3d 798. (*Hofferber, supra*, 28 Cal.3d at pp. 174-175.) Nevertheless, we do agree an incompetent

situations," defendant continues, "the California Supreme Court found that the requisite finding justifying incarceration should be found under a beyond a reasonable doubt standard of proof." Again, we disagree with defendant's premise that section 1170.126 makes a second strike term the presumptive maximum. Defendant is subject to the third strike term based on (1) the jury's finding, beyond a reasonable doubt, that he possessed and transported methamphetamine, and (2) the trial court's finding of two prior strikes, subjecting him to sentencing under the three strikes law. Thus, unlike the involuntary commitment situations, the dangerousness hearing contemplated by section 1170.126 does not place a defendant's liberty at stake. That liberty has already been lost.

Finally, we also reject defendant's argument the dangerousness finding "should at least be made upon a showing of clear and convincing evidence." This argument is based on Ninth Circuit Court of Appeals precedent holding that "when a sentencing factor has an extremely disproportionate impact on the sentence relative to the offense of conviction, due process requires that the government prove the facts underlying the enhancement by clear and convincing evidence." (*United States v. Jordan* (9th Cir. 2001) 256 F.3d 922, 930; see also *United States v. Pineda-Doval* (9th Cir. 2010) 614 F.3d 1019, 1041.) Aside from being non-binding authority, these cases are inapposite since they deal with proving a factor that *enhances* a sentence. Again, in the context of section 1170.126, a finding that resentencing a defendant to a second strike term would pose an unreasonable risk of danger to public safety does not enhance that defendant's sentence because he or she is already subject to the third strike term. Instead, assuming eligibility, a finding that resentencing would *not* pose such a risk, leads to a *lowering* of the third strike term to a second strike term.

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criminal defendant's "dangerous mental condition must be found beyond a reasonable doubt." (*Id*. at p. 178.)

In sum, we conclude the prosecution had the burden of proving resentencing defendant would pose an unreasonable risk of danger to public safety by a preponderance of the evidence, following *Kaulick, supra*, 215 Cal.App.4th 1279, and reject defendant's arguments that eligibility for resentencing under the Act effectively reduced his sentence to a statutorily-presumed second strike sentence, making the finding of dangerousness a factor that enhances the sentence, and therefore the federal Constitution required dangerousness to be proven to a jury beyond a reasonable doubt, or at the very least, by clear and convincing evidence.

DISPOSITION

The judgment is affirmed.

/s/
HOCH, J.

We concur:

/s/
ROBIE, Acting P. J.

/s/
MAURO, J.